Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1392

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner,

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner is barred by the doctrine of collateral estoppel from maintaining this fifth suit[1] against the Respondents, which is based solely upon a continuation of the same facts alleged in the first four cases, all of which were dismissed by summary judg-

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1 543 F.2d 1106-107.

ment following a judicial determination[2] that the facts brought forth by deposition, pre-trial conferences, and other discovery devices did not show monopolization, attempted monopolization or conspiracy under Sections 1 or 2 of the Sherman Act.

STATEMENT OF THE CASE

Respondents respectfully refer this Honorable Court to the Fifth Circuit Court of Appeals' statement of the judicial history of Petitioner's prior four actions, which is set forth at 517 F.2d 110,, pages 111 through 115, *Cert. Denied*, 423 U.S. 1054. The instant action copied the allegations of the prior four actions in every respect, except that the instant action purports to cover the four-year period immediately following the four-year period involved in its fourth action.

Respondents respectfully call this Court's attention to the fact that Petitioner recently presented the identical question in its Petition No. 75-667 (October Term 1975) requesting review by this Court of the Fifth Circuit's unanimous affirmance — under collateral estoppel principles — of summary judgment dismissals of Petitioner's 3rd and 4th actions based upon continuance of the same facts asserted in Petitioner's 1st and 2nd actions, which had also been judicially determined to be non-actionable and dismissed.

In its prior Petition, Docket No. 75-667,, Petitioner stated the "*issue*" as follows:

2 421 F.2d 1313, 1320; Cert. Den. 400 U.S. 991.

> "Whether a summary judgment, dismissing a suit with prejudice, but without any trial or findings of fact, can have any collateral estoppel effect on a subsequent suit between the same parties, and based primarily on the same course of alleged unlawful conduct, but involving a new cause of action."

This Court's denial of that Petition is reported at 423 U.S. 1054.

Conclusive confirmation by Petitioner's counsel that Respondents' acts charged by Petitioner in the instant action, are the same as were going on during the pendency of Petitioner's fourth action, was made by Petitioner's counsel in the argument of Respondents' motion for summary judgment. We respectfully refer to the following questions and responses:

The Court:

> "But, the only difference you would have then, is you say that the monopoly that was begun earlier has continued?"

Mr. Henican:

> "Yes, Sir, We conceded, and in candor, must concede that as far as I can now say, there is no substantial difference in kind between the acts that are now going on, and the acts that were going on between the pendency of the last suit."

The Court:

> "If those acts committed by defendants prior to the decision or institution, whichever may be the controlling date of the lawsuit, were

legal, *then their continuation would be legal; would they not?*" (Emphasis added)

Mr. Henican:

"I don't know that I can answer that."

ARGUMENT

The Fifth Circuit Decision Is Consistent With This Court's Decision In Lawlor v. National Screen Service Corp.

Petitioner's Question No. "3" — "Whether the decision below is in conflict with the Opinion delivered by this Court in the case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322" — was conclusively answered by this Court in rejecting Petitioner's last petition for certiorari.

The facts, as well as the legal question in the instant case, are crucially different from those in the *Lawlor* case. The prior judgment in *Lawlor* was a consent judgment based upon a settlement "*prior to any trial.*" In the instant case, the prior judgments were based upon judicial determination of facts brought forth by deposition, pre-trial conferences, and other discovery devices, from which the Court determined that neither monopolization, attempted monopolization, nor conspiracy under Sections 1, 2, or both of the Sherman Act were present. See 421 F.2d 1320.

Moreover, *Lawlor* did not deal with the principle of collateral estoppel, as this Honorable Court noted at page 326 of the *Lawlor* opinion:

"Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved *because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.*' " (Emphasis supplied)

The foregoing quotation from this Honorable Court's Opinion, has been previously quoted in refutation at page 7 of Respondents' brief in *Opposition* to Petitioner's identical contention in its *prior* Petition No. 75-667, and we regret to burden this Court with this repeated, but necessary response.

Petitioner's Contention That A Summary Judgment Cannot Form The Basis For Collateral Estoppel Is Contrary To Settled Law.

It is settled law that the formalities of a trial, attended with formal findings of fact, are not prerequisites to the application of the doctrine of collateral estoppel.[3] The *Napa Valley* case provides a good example of how far this Honorable Court has gone to prevent repetitive litigation. There the plaintiff utility had its contract rates reduced by the Railroad Commission, in spite of subsisting contracts at higher rates. Plaintiff petitioned the California Supreme Court to issue a Writ of Review of the Railroad Commission's decision — but the California Supreme Court refused to issue such a writ.

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3 *Napa Valley Electric Co. v. R.R. Commission of California*, 251 U.S. 366 (1920).

Plaintiff then sued in the United States District Court to enjoin the Commission from enforcing its orders. The Commission moved to dismiss on the ground that the subject matter had been judicially passed upon the Supreme Court of California when it refused to issue the writ, which refusal was pleaded in bar to the motion in the United States District Court.

In affirming the District Court's dismissal, this Honorable Court said, at pages 372-373:

> "And so with the denial of the petition of the Electric Company, it had like effect and was the exercise of the judicial powers of the court. And we agree with the district court that 'the denial of the petition was necessarily a final judicial determination, based on the identical rights', asserted in that court and repeated here. Williams v. Bruffy, 102 U.S. 248, 255. *And further, to quote the district court 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact' . . . Calaf v. Fugural v. Calaf v. Rivera*, 232 U.S. 371; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299;
>
> "The Court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore, the decree of the District Court is affirmed." (Emphasis supplied)

CONCLUSION

Respondents respectfully submit that since the Petition fails to present any question of law or issue requiring review by this Honorable Court, Petitioner's application for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Opposition have been served on the following counsel for Petitioners, at the addresses following their names, by United States mail, postage prepaid, on this ____ day of May, 1977.

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